U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 June 2007

Case No.: 2006-LHC-741

OWCP No.: 07-156648

IN THE MATTER OF

L. G.,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

DEBORAH BAS-FRAZIER, ESQ.,
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.,
On Behalf of the Employer

B**EFORE: PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Northrop Grumman Ship Systems, Inc./Ingalls Shipbuilding (Employer).

[1] 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 23 Jan 06. All parties were represented by counsel. On 18 Sep 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[2]

Witness Testimony of
Claimant
Tommy G. Sanders

Exhibits
Employer's Exhibits (EX) 1-28[3]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[4]

1. There is jurisdiction under the Act.

2. The injury occurred in the course and scope of employment.

3. An Employee/Employer relationship existed at the time of the accident.

4. Employer was properly notified of the injury.

5. Employer filed its notice of controversion on 1 Aug 00.[5]

6. Claimant received temporary total disability benefits from 26 May 00 through 30 Jul 00; 13 Nov 00 through 25 Feb 01; 31 Aug 02 through 25 May 03; and 5 May 04 through 15 Mar 05, at a compensation rate of $405.35 per week.

7. Claimant has a 37% disability per each lower extremity.

8. Medical benefits have been provided.

[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[3] EX-25 and EX-26 are depositions of Claimant. Since Claimant testified live at the formal hearing, Counsel were cautioned that the Court would only consider pages specifically cited to.
[4] JX-1.
[5] Claimant alleges that if he was underpaid by Employer, he is entitled to penalties based on the underpayment.

9. Claimant reached maximum medical improvement on 14 Sep 00, 19 Mar 01, and 3 Mar 05.

10. An informal conference was held on 4 Jan 06 to discuss the nature and extent of disability and average weekly wage.

ISSUES[6]

1. Maximum Medical Improvement

2. Nature and Extent of Disability

3. Average Weekly Wage

4. Section 8(f) Special Fund Relief

5. Penalties

FACTUAL BACKGROUND

Claimant has a history of knee injuries. By 16 Dec 99, she had been working on her knees for approximately six months and both knees had begun to hurt. On that day while at work for Employer, she "got caught" trying to step on an angle iron and fell. She landed on her hands and hit both knees. Her knees also swelled at night.

She continued working, but eventually had to stop on or about 26 May 00. Over the next few years, she had arthroscopic surgeries and total knee replacement surgeries to both knees. She returned to work between the time of her arthroscopic surgeries and ensuing knee replacements. Two replacement surgeries were performed on her left knee. She did not return to work after her knee replacements. She had revisions to her knee replacements performed in 2004. The parties do not dispute that Claimant cannot return to her pre-injury welding work.

POSITIONS OF THE PARTIES

Claimant contends she is entitled to temporary total disability benefits from 26 May 00 through 30 Jun 00 and from 13 Nov 00 through 25 Feb 01. She was paid for those periods. Claimant also contends that she again became entitled to temporary total disability benefits from 31 Aug 02 through 3 Mar 05, at which point she reached maximum medical improvement and became permanently totally disabled. She was paid temporary total disability benefits from 31 Aug 02 through 25 May 03 and 5 May 04 through 15 Mar 05. The only dispute regarding the periods for which she was paid

[6] JX-1.

appears to be whether the payments were based on the correct average weekly wage. Employer insists that for those periods during which Claimant was not paid total benefits, she had suitable alternative employment available and it has appropriately paid her for her scheduled injury.

Claimant contends she is entitled to permanent total disability benefits from 4 Mar 05 to present and continuing. Employer responds that she is capable of some employment and is partially disabled; therefore she is entitled only to a scheduled award. Alternatively, Employer contends that it is entitled to Second Injury Fund relief based on Claimant's pre-existing knee injuries. The Solicitor argues that the evidence does not support the Employer's claim for Section 8(f) relief.

Claimant contends that her average weekly wage is $640.15, based on 235 days worked or in the alternative, $609.05, based on 247 days worked. Employer counters that Claimant has an average weekly wage of $606.55, based on 248 days worked.

LAW

Although the Act must be construed liberally in favor of the claimant,[7] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[8] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[9]

In arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[10] If a physician's opinion is based on a claimant's subjective complaints and the claimant is not credible, then the physician's opinion is questionable.[11]

[7] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[8] 5 U.S.C. § 556(d).
[9] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[10] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[11] *Director, Office of Workers' Compensation Programs [Roberson] v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65, 12 BRBS 344 (5th Cir. 1980), *aff'g* 8 BRBS 775 (1978).

Average Weekly Wage

The Act provides:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.[12]

The only issue in this case relating to AWW is the inclusion of vacation days in the calculation of the number of days used to determine the average daily wage. A 1990 Board decision addressed the use of vacation days, albeit in a slightly different context.

> [T]he administrative law judge determined that claimant had not worked "substantially all" of the year preceding the injury . . . Accordingly, we hold that the administrative law judge should have included the 6 weeks of vacation as time which claimant actually worked in the year preceding his injury, giving him a total of 34.5 weeks.[13]

The Fifth Circuit opinion in *Wooley*[14] let stand an ALJ's decision that vacation days "sold back" do not count as days worked and vacation days taken do. It refers to the ALJ's treatment of both vacation and holiday compensation and adds, in a footnote, that for the purposes of the opinion there is no meaningful distinction between the two. However, the BRB opinion below did not mention holiday compensation and addressed only vacation days.[15]

Following the issuance of that decision, the Board addressed the issue again and applied *Wooley* to the consolidated cases cited by Employer.[16] In *Richmond*, the claimant had 24 days of both vacation days and holidays on which he did not work, but for which he was paid. The Board held that those days were properly included in the total of days

[12] 33 U.S.C. §901(a).
[13] *Duncan v. Washington Metro. Area Trans. Auth.*, 24 BRBS 113 (1990).
[14] *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000).
[15] *Wooley v. Ingalls Shipbuilding, Inc,* BRB No. 98-0501 (Jun 22, 1999).
[16] *Richmond v. Northrop Grumman Ship Systems, Inc.; Robinson Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0852 (Mar 3, 2006).

worked for the computation of AWW. [17] Although the Board treated the ALJ's determination that those days were "days worked," as a finding of fact, it really was a legal conclusion based on factual findings that claimant had been paid for days on which he did not report to work, whether characterized as vacation days or holidays.

Consequently, *Richmond* allows for no conclusion other than that the absence of a distinction between vacation days and holidays goes beyond the *Wooley* opinion. Holidays for which a claimant is paid, but on which he does not work, count as "work days." The reasonable extrapolation of these cases is that the number of days worked divisor for the average daily wage calculation is based on the total calendar days for which the employee was paid, whether he was away from the job on personal vacation or a company paid holiday, or was actually on the job.

Maximum Medical Improvement

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement (MMI).[18] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[19] An employee reaches maximum medical improvement when his condition becomes stabilized.[20]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[21] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[22] Therefore, for a claimant to receive a disability award, an economic loss coupled with a

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[17] The board did allude to one possible exception in a circumstance where the application of the rule would lead to a five day worker having more than 260 days, but that would not apply in this case.

[18] *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 235 n. 5 (1985); *Trask*, 17 BRBS 56; *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

[19] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

[20] *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

[21] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

[22] 33 U.S.C. § 902(10).

physical and/or psychological impairment must be shown.[23] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[24] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[25] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[26] However, an underlying permanent condition is not altered by a period of temporary disability due to a subsequent surgery.[27]

The question of extent of disability is an economic as well as a medical concept.[28] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[29]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[30] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

Where a claimant is permanently partially disabled for an injury set forth in §§ 8(c)(1)-(20) of the Act, then the injured claimant is entitled to a scheduled award.[31]

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by showing that she is totally disabled.[32] Unless the worker is totally disabled, however, she is limited to compensation provided by the appropriate schedule provision.[33]

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[23] *Sproull*, 25 BRBS at 110.
[24] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[25] *Trask*, 17 BRBS at 60.
[26] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[27] *Richmnd v. Northrop Grumman Ship Systems,* BRB No. 06-0437 (Feb 27, 2007) (unpublished).
[28] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[29] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[30] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).
[31] 33 U.S.C. §908(c); *Potomac Electric Power Company*, 449 U.S. 268, 270-271, 274 (1980).
[32] *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363 (1980) (herein "PEPCO"); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 168, 173 (1984).
[33] *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984).

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of her average weekly wage for a specific number of weeks, regardless of whether her earning capacity has been impaired.[34] The remedies are exclusive.[35]

Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty-six and two-thirds percent (66 2/3%) of the average weekly wage.[36] Section 8(c)(19) of the Act further states that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."[37]

Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[38] Addressing the issue of job availability, the Fifth Circuit has developed a two part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[39]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[40] Employers may meet their burden by first introducing evidence of suitable alternate employment at the hearing,[41] even though such evidence may be suspect and found to be not credible.[42]

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[34] *See Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).
[35] *General Construction Co. v. Castro*, 401 F.3d 963, 969 (9th Cir. 2005).
[36] 33 U.S.C. §908(c)(2).
[37] 33 U.S.C. §908(c)(19).
[38] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[39] *Id.* at 1042.
[40] *P & M Crane Co. v. Hayes,* 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[41] *Turney*, 17 BRBS 236-37 n. 7 (1985).
[42] *Diamond M. Drilling Co.*, 577 F.2d at 1007 n. 5.

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[43] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[44] A showing of only one job opportunity may suffice under appropriate circumstances.[45] Conversely a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[46] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[47]

A showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI. An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available.[48] MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis."[49] "[I]t is the worker's inability to earn wages and the absence of alternative work that renders [him] totally disabled, not merely the degree of physical impairment."[50]

Section 8(f) Special Fund Relief

The Act makes current employers liable for the entire disability when employees suffer aggravations of a pre-existing condition. In an attempt to ameliorate the consequential disincentive employers might have to hire such employees, the Act also provides that employers can seek relief from a special fund in cases where a pre-existing condition makes a disability worse than it would have been with just the second injury.[51]

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim.[52]

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[43] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[44] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *see generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[45] *P & M Crane Co.*, 930 F.2d at 430.
[46] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[47] *Turner*, 661 F.2d at 1038 (quoting *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[48] *Rinaldi*, 25 BRBS at 131.
[49] *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991).
[50] *Id*.
[51] 33 U.S.C. § 908(f).
[52] *Director, OWCP v. Cargill, Inc.,* 709 F.2d 616, 619 (9th Cir. 1983).

The law encourages employers to retain or hire workers who, because of previous injury or disabilities, may be at risk of increased disability from on the job injuries by limiting their compensation exposure.

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury . . . In all other cases of total permanent disability . . . found not to be due solely to that injury . . . the employer shall provide . . . compensation payments . . . for one hundred and four weeks only.[53]

Employers seeking to obtain § 8(f) relief in cases of permanent total disability must show a manifest pre-existing permanent partial disability and that the permanent total disability is not due solely to the work-related injury. This is in contrast to the case of a permanent partial disability, where employers must show that the ultimate partial disability is materially and substantially greater than the disability resulting solely from the work-related injury would have been.[54]

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the current disability is not due solely to the employment injury.[55]

The employer must offer some evidence of the extent of the permanent partial disability had the pre-existing injury never existed.[56] It is not enough to only show an increase of percentage of impairment from the pre-existing disability to after the second injury.[57]

Penalties

The Act provides an incentive for employers to give prompt notice of a possible disagreement over compensation due an employee.

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of

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[53] 33 U.S.C. §908(f).
[54] *Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 131 F.3d 1079, 1081 (4th Cir. 1997).
[55] 33 U.S.C. § 908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'd* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).
[56] *Two "R" Drilling*, 894 F.2d 748.
[57] *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 8 F.3d 175, 184 (4th Cir. 1993).

> this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice [of controversion] is filed under subdivision (d) of this section . . .58

Where the employer pays some compensation voluntarily, fails to controvert the remainder, and the claimant ultimately is awarded compensation in an amount greater than that which the employer voluntarily paid, the employer's liability under Section 14(e) is based solely on the difference.[59] An informal conference can satisfy the controversion requirement in terms of terminating the penalty assessment period.[60]

In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice.[61] The employer must file on or within the 14th day after it has knowledge of the injury, not knowledge of the claim.[62] Where the employer fails to file a notice of controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[63] Therefore, where an employer fails to file a timely notice of controversion, it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

The requirement to controvert applies even in cases where the employer pays some compensation, but disputes the amount.[64] The employer should pay the compensation it considers due and controvert the remainder.[65] If it fails to do so, and the claimant ultimately is awarded compensation in the higher amount, the penalty is based solely on the difference.[66] The employer must controvert the claim on specified grounds and cannot merely state that it might later controvert the claim.[67] Timely controversion shields the employer from liability under Section 14(e) even if it abandons the specific

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[58] 33 U.S.C. § 914(e)(2001)

[59] *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).

[60] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979).

[61] *See Spencer v. Baker Agric. Co.*, 16 BRBS 205, 209 (1984).

[62] *See Jaros v. National Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988); *Spencer*, 16 BRBS at 209; *Wall v. Huey Wall, Inc.*, 16 BRBS 340,343 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981); *Davonport v. Apex Decorating Co.*, 13 BRBS 1029, 1041 (1981); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985).

[63] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Hearndon v. Ingalls Shipbuilding Inc.*, 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).

[64] *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592, 595 (1980).

[65] *Alston v. United Brands Co.*, 5 BRBS 600, 607 (1977).

[66] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979), *remanding in pert. part* 5 BRBS 290 (1977); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).

[67] *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 898 F.2d 1088, 1095 (5th Cir. 1990).

grounds listed in its controversion and adopts new ones.[68] A notice of controversion or informal conference terminates Section 14(e) penalty liability as of the date of the filing of the notice of controversion or on the date of the informal conference.[69] The penalty attaches to all payments which are "due and unpaid" at the time liability ceases.[70]

EVIDENCE AND ANALYSIS

Testimonial Evidence

Claimant testified live in pertinent part that:[71]

> She was born on 18 Jun 44 and is 62 years old. She has a high school education and speaks with a stutter. She can read and write. She first worked for Employer from 1971 to 1978, at which point she went to Chicago and worked as a welder and structural welder for about three or four years. She got laid off from the job in Chicago. She went back to Employer on 12 Aug 85 and has been with Employer ever since. She does not have any skills other than welding.[72]
>
> Her regular work week was 40 hours Monday through Friday. If she worked more than eight hours a day or on Saturdays, she made time and a half. If she worked on Sunday she earned double-time. She worked as a member of the union. She was offered "holidays" on Labor Day, Thanksgiving, Christmas, Easter, and Good Friday. She had to earn holiday pay – she got it after working so many hours. Since Easter landed on a Sunday she was given the following Monday as a holiday. She was given two days off for Thanksgiving and about 17 or 18 days for Christmas. Employer only paid for Christmas days off and the time worked. When they returned from the holiday, if they showed up they would get paid for New Years. However, she could use her vacation days to make sure she had enough hours before a holiday to earn it. If she did not have enough hours, then she had to work five hours before the holiday and six hours after to earn the time off, otherwise she would lose her holiday pay. If she worked on the holiday then she got "holiday extra," which is double time. If she earned her holiday pay she would also receive that. It would all be for the single day. If she took off for a vacation or holiday, she was paid for having worked that day[73]
>
> Claimant took her holidays off. She did not sell back any of her holidays by working during the holiday. She could not recall, but believed she gets six or eight days for Christmas. For 12 Dec 99, Claimant was paid for 88 hours of work.

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[68] *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (1979).
[69] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).
[70] *Pullin v. Ingalls Shipbuilding*, 27 BRBS 45, 46 (1993).
[71] Tr. 28-142.
[72] Tr. 28-30, 72, 75-76.
[73] Tr. 30-34, 83-86, 131-132.

This time included the 40 hours she actually worked the preceding week and also an advance for six days for Christmas. It is not a bonus pay, it is holiday pay for six days. Workers get anywhere from 17 to 21 days off, but they are only paid for six to eight. That was how she worked up until her date of injury, 16 Dec 99.[74]

Employer offered opportunities to earn bonus pay. If she worked 40 or 45 days without missing any time she could earn a bonus. The bonus is automatic after so many days. It is put into the regular paycheck. Holiday, vacation, and Sunday pay are also put into the regular paycheck for the following pay period. She could choose how she used her vacation. She was not offered paid sick days and would use her vacation days instead. She never took vacation time for periods that she worked an entire week. Her vacation days were not considered unexcused absences. She did not have to work seven days per week to earn her bonus.[75]

Claimant had a prior arthroscopic surgery done on her left knee on 31 Oct 86. She was kept off work for and received disability compensation for that injury. She continued to draw compensation even after she returned to work, but did not know if she was given any permanent restrictions for that left knee injury. Dr. Cope performed surgery on her right knee in 1991. Dr. Cope told Claimant that she would have trouble working as a welder. Nonetheless, Claimant returned to Employer and worked within her restrictions. She received disability compensation for a 10 percent disability rating to her right knee. Employer accommodated her limitations. She had additional problems with her knees in 1993 and 1994 and had occasional problems with her knees all the way up to 1999.

She continued to work for Employer up until she had another work injury on 16 Dec 99, which is the subject of this suit. Claimant got caught trying to step on an angle iron and fell on her face. She went down on her hands, hitting both knees and scarring her hands. She treated with either Dr. Cope or Dr. Wiggins for the 1999 incident.[76]

Drs. Wiggins, Black, Cope and Johansen treated Claimant's knee problems. Her current doctor is Dr. Johansen. She last treated with Dr. Johansen in August 2006. His assistant gave Claimant an injection in her left knee. He also gave her medication and a cream. The cream did not help and the medication only helped her right knee. Claimant told Dr. Johansen about her knee problems. She cannot ride in a car because it is too low. She cannot wear heals. To get into bed she has to sit on the bed and lift her left leg into bed. Dr. Johansen had her measured for a brace that she should wear "as much as possible."[77]

[74] Tr. 34-35.
[75] Tr. 34-37.
[76] Tr. 37-38, 76-81.
[77] Tr. 38-40., 82-83.

Although her right knee still hurts, she can live with it. However, when she stands her left knee feels like it is being stuck with something. Her left knee also swells if she does any small activities, such as standing or walking. The worst thing she ever did was get the second surgery because she can actually feel stuff move around in her knee.[78]

She cannot really do any activities around the house. She can no longer clean the house on her own. The lower part of dusting is too low. She once fell while mopping. Her niece comes and does all the dusting and heavy cleaning because of Claimant's constant leg pain. She cooks for herself and her husband, but not everyday because they eat leftovers. They eat a late breakfast and an early supper. She cannot drive alone and cannot sit in a car. She had to get a truck because cars are too low. She cannot wear heals anymore. She does a little vacuuming around the house, mostly just her bedroom and the hallway. Before her work injury, she could move furniture to vacuum and flip the bed mattresses, but she cannot anymore.[79]

She goes to church on Saturdays and has bible class on Fridays. They both last about two hours. She also participates in fellowship – everyone brings a covered dish and eats. She helps clean up the paper products and puts them in the trash. She usually washes the silverware and someone else dries. She does not do it alone and usually has three other people helping. It is the same group every week and it usually takes about 20 minutes to clean up. By Sunday morning, her knee is "tired." She stays in bed and rests until she eats around noon.[80]

On a daily basis, she has about a three or four out of ten pain level in her right knee. She can live with the pain. However, she has about a seven or eight out of ten pain level in her left knee. The medicine helps her right knee, but it does not help her left. Her left knee feels like it is pinned and tight. It does not feel good and just hurts. It did not feel that bad prior to her second left knee surgery. She believes the revision was the worst thing she could have ever done because it now feels worse. Dr. Johansen said he would not go back in and work on the knee again. If she had to have another surgery, she would not do it with Dr. Johansen.[81]

She has never met with a vocational counselor and had never seen Mr. Sanders prior to the formal hearing. She received a letter in August 2006 that had papers from Mr. Sanders attached. It said that Dr. Johansen said she could lift 65 pounds. She testified that she could not lift 65 pounds. She admitted that as a welder she had to carry her wire and box, which could weigh 60 or more pounds. However,

[78] Tr. 40-41.
[79] Tr. 41-43.
[80] Tr. 43-45, 135.
[81] Tr. 45-46, 135-136.

lifting that much weight requires lifting with the knees and she cannot do that. She could lift that weight prior to her knee problems and subsequent replacements.[82]

The letter from Mr. Sanders included a list of jobs that were suitable for her. She went to every place listed (Best Western, Classy Chassis, Auto Byrd, and Thousand Trails) and submitted her application. Best Western told her that they would call her when they started interviewing. She also turned in applications to 8 Days, Shoe Lane, and most of the hotels in the area. No one has called her for an interview. Claimant has no experience working in a hotel or as a cashier. She did not know what a desk clerk trainee does and never worked as a dispatcher. Although she submitted an application to Auto Byrd, she was advised that they were not hiring. She put Mr. Sanders' name on the application as the person who referred her for the position, but they did not know who Mr. Sanders was. After playing phone tag with the company, she was advised that Thousand Trails was not hiring either. She was told that they would contact her if a position became available, but she has not heard from anyone at Thousand Trails. She went to Classy Chassis three different times. She completed three separate applications for the job. She went to these places on 21 Aug 06.[83]

She filled out an application at Treasure Bay Casino for a dispatcher or security guard position. They did not have any openings as a dispatcher. They were hiring security, but required at least six months experience. She has no experience with security work. She never heard back from Treasure Bay Casino.[84]

She did not apply to the Winn Dixie in Pascagoula because it was closed. She went to the Ocean Springs store, but was advised that she had to complete the application online. She does not know anything about the internet. Nevertheless, she applied to Winn Dixie with the help of her nephew. He used the keyboard and she told him what to write. She applied for the cashier position. She has not heard back from Winn Dixie. She also applied for a job with Mississippi Security Police. She filled out an application and was told that she would be contacted. She has not heard from Mississippi Security Police.[85]

She looked for work with Wackenhut Security too, but she could not find the office. She could not find the name of half of the streets. She also tried calling, but neither number she had worked. Although she had trouble finding it, she applied for work with Best Security. She completed a work application. She

[82] Tr. 46-47.
[83] Tr. 47-53.
[84] Tr. 53-55.
[85] Tr. 55-56.

spoke with someone who advised her about available retirement benefits and health insurance. That person took her application to the boss and advised her that the boss did the hiring. Claimant has not heard back from anyone at Best Security.[86]

Claimant also sought employment from places not in Mr. Sanders' letter. She filled out an application at Boomtown Casino, but never heard back. She applied for either a control clerk or uniform clerk position, but could not remember which. She might have applied for a position as a security hostess or as a cashier. Regardless, she was not offered an interview or a job and never even heard back from Boomtown. She applied at Boomtown in person. She also went to IP Casino and filled out an application. She got an interview there, but IP was not hiring. She was told that the position would require that she run steady all the time and it was not a slow job. She was also asked about why she left Employer. She was advised that she would not qualify for the job because it would require her to be on her legs continuously throughout the day and Claimant does not have any office experience to put to use.[87]

She also contacted Beau Rivage through her cousin. Her cousin went online with her. The only available position was for a housekeeping job. She has not heard back from Beau Rivage. Although Beau Rivage was hiring for a variety of jobs, it wanted someone with experience. She applied for a position at Isle of Capri for a security guard position. She completed an application, but never heard back. She also completed an application for a job at the Grand Casino. She tried to apply in person, but was told she must do it online. Her cousin helped her apply online for this job, too. She believes it was for a position with security. She has not heard back from the Grand Casino.[88]

She applied for a position at Wal-mart. She had to apply online, so she got her granddaughter to help her. She has not heard back from Wal-mart. She applied for a position as a greeter. She did not try to get a job at any restaurants, but did go to a convalescence home. She was advised that it did not have any openings since all the work was subcontracted. She went to the convalescence home about one week prior to the 18 Sep 06 formal hearing. She completed an application at Barnhill's. However, the job would require that she squat, bend, and stoop. She walked out without turning in her application.[89]

[86] Tr. 57-60.
[87] Tr. 60-64.
[88] Tr. 64-66.
[89] Tr. 66-68.

She put on some of her applications that she used to work for Employer. She also put on some of the applications that she had a knee injury. If she was asked by the potential employers why she no longer worked for Employer, she told the truth about her knee injuries.[90]

She has never worked as a cashier. She has never used a computerized cashier register. She never learned how to do credit card charges.[91]

If any of the jobs she applied for called her back with a job offer, she would work the best that she could. She believes she might have been able to do the jobs she applied for, for a period of time, but did not know how many hours or days she would be able to continue doing the work. She would have at least tried. She only looked for jobs in August and September 2006. All the jobs were for forty hour work weeks. In those two months she has noticed a difference in her knees. The standing, walking and getting in and out of places, have caused her left knee to hurt more. It hurts her to walk up steps. Her knees swell regardless. Wearing short pants helps when her knee swells because she can pull the pants above her knee and let the knee out since the pant leg will be tight around her knee.[92]

Claimant does not believe she can work a forty hour week because of standing. However, it all depends on whether the job requires bending or stooping. If her doctor said she could stand, walk, lift 10 to 20 pounds for an eight hour day, he is a liar. She applied for the jobs regardless of whether she believed she could actually do the work. She did not believe she could do most of the jobs she applied for. She walked out on the Barnhill's job because she thought there was no point based on the physical requirements of the position. She did not want to lie on the application because she would have ended up being fired anyway. She believes she might have been able to do the other jobs she applied for.[93]

She does not currently wear any type of brace on her knees or walk with a cane. Although she was not wearing a knee brace at the formal hearing, she was supposed to be receiving one soon. She drove to the formal hearing. She takes her pain medication only as needed, but still takes her medication regularly for her left knee. She takes a pain pill every morning and one when she gets ready to lie down. Even though in her deposition she stated that she did not take any medication everyday, at formal hearing she testified that she has been taking her medication daily "all the time."[94]

[90] Tr. 56-57.
[91] Tr. 53.
[92] Tr. 68-71.
[93] Tr. 69-72.
[94] Tr. 72-75, 131.

She is not exactly sure how she hurt her knee in December 1999. She just knew that she was working on her knees for about six months when both knees started hurting. She started treating with Dr. Black for her knees. Dr. Black allowed her to continue working until she reached a point where he felt she needed to be pulled off work. He pulled her off work on 26 May 00. She had surgery on her right knee a few days later. Dr. Block eventually released her to return to work on 31 Jul 00. She returned to work for Employer with restrictions. Claimant was restricted from working on her knees and squatting. She advised Employer of her restrictions and Employer put her back to work within them. She returned to work making her regular wage and working her regular hours. She had good attendance upon returning to work. She did not receive any warning slips for doing poor work. She gave Employer a good day's work for a good day's pay. She continued to receive compensation benefits after she returned to work because of her 12 percent disability rating to her leg.[95]

Even though she was able to return to work regarding her right knee, her left knee starting having more and more problems. On 14 Nov 00, Dr. Black pulled her from work and performed a left knee arthroscopic surgery. She stayed off work until 26 Feb 01. She returned to work with additional restrictions. Claimant could not squat, work on her knees, or climb. She returned to work in the shop at the shipyard. She was put at a table. She continued to earn the same wage and work her regular hours. She had a good working relationship with her supervisor and had good attendance. She continued to give them a good day's work for a good day's pay. However, she also received compensation benefits based on a scheduled permanent partial injury for her leg.[96]

Although she returned to work and worked for more than one and one-half years, her knees kept bothering her. She began treating with Dr. Johansen in July 2002. Mr. Johansen recommended knee replacements. He performed a right knee replacement on 3 Sep 02 and a left knee replacement on 31 Dec 02. Dr. Johansen believed the surgeries went well and she told him she thought her right knee was better.[97]

She submitted to a functional capacity evaluation (FCE) in June 2003 per Dr. Johansen's request. The FCE concluded that she could perform light duty work. Claimant denied that she only looked for one job up through April 2004. She knew she applied for jobs in 2003, but could not remember the month. At first she could not dispute that the first job she applied for was not until 17 Nov 03, even though the labor market survey found jobs available in June 2003. However, a copy of an attachment Claimant submitted with her interrogatories[98] reflected that

[95] Tr. 83-89.
[96] Tr. 89-91.
[97] Tr. 91-92.
[98] EX-17 (an attachment to Claimant's interrogatories was admitted as EX-17, p. 7, during formal hearing).

Claimant also applied for a job on 4 Oct 03 at Restoration, a nursing home. There were five other jobs listed on the attachment that Claimant alleged she applied for – Holiday Inn, Schuler Company, Best Western and Michaels. She also applied for a job at Singing River Hospital. She did not apply for the jobs listed on the June 2003 labor market survey – Classy Chassis, Monroe Petroleum, or Magnolia Security. She claimed she did not know if she even got the letter from Mr. Huey that included those jobs.[99]

In September 2003, she received a labor market survey from Mr. Sanders that included the jobs at Singing River Hospital, Monroe Petroleum, and Swetman's Security. She applied for that job. She could not recall if she went to those jobs on her own or because she was told to by Mr. Sanders. Regardless, she applied for the job at Singing River Hospital. She said she also applied for the security job, but it was not listed on the attachment. She stated that if it was not on there, she did not apply for the job.[100]

When she applied for the jobs she just filled out the application. She did not tell all of them about her problems, but sometimes she did. She did not know if she just volunteered that information. After she was reminded of her deposition testimony, Claimant admitted that she volunteered the information about her knee problems. She admitted that some of the jobs did not ask for the information, but she volunteered it anyway. She told them about her limitations. However, she claimed that she did not tell everyone that she had problems. She just told the truth. She did not tell them what she could do because she was never asked. She found the other jobs she applied for because they were off of I-10. She said the jobs could have been in the letter from Mr. Sanders.[101]

In April 2004, Mr. Sanders ran another labor market survey. He located jobs at Classy Chassis and Big K. The job at Singing River Hospital was still available. She went to Singing River Hospital twice, but not after Mr. Sanders' last letter. She did not recall how she found the jobs she actually applied for. None of those jobs were hiring. She was willing to try to work the jobs that she had applied for. Claimant explained that she did not apply for the jobs Mr. Sanders' located because she had her knee revision.[102] She denied that she never actively looked for a job. She claimed that every time she got a letter, she went and tried to get the jobs. She even went to some on her own.[103]

[99] Tr. 92-99.
[100] Tr. 99-101.
[101] Tr. 101-104.
[102] Claimant's knee revision was 21 days after Mr. Sanders' 13 April 04 letter.
[103] Tr. 104-107.

She cannot get anybody to hire her and it gets depressing to keep getting turned down. The last application she filled out, she ended up ripping it up and running.[104]

Claimant got re-pulled off work on 3 May 04 for a repair to her left total knee replacement. Dr. Johansen performed the surgery. He advised her that it went well and that she was better. He told her that her strength, mobility, and range of motion were good. Dr. Johansen released her again on 3 Mar 05. She was aware that Mr. Sanders located jobs available as of 3 Mar 05 at Classy Chassis, Treasure Bay, and Winn Dixie. However, Claimant did not seek work again until August 2006. She did not look for jobs until after she got a letter from Mr. Huey giving her places to go. She did not look for jobs before August 2006 because she knew she would not be able to work. She was having the same problems then that she had at the formal hearing. Nevertheless, she is willing to give it a try. She knows she will have a hard time because she has a hard time even doing little things around the house.[105]

Claimant started applying for jobs right before trial. She is not counting on Mr. Sanders to find her a job because every time he sent her somewhere the phone number and addresses were wrong. She never called him to ask for additional information. She went by the letter because she figured that the information was correct. She completed a form that listed the jobs for which she completed an application.[106] It reflects that she looked for jobs on 5 and 6 Sep 06. Claimant kept a list of the jobs she applied for to help her remember them. She explained that she went and picked up the applications, completed them and returned them, in September 2006. She picked up the applications after she got the letter from Mr. Huey at the end of August. She applied for the jobs because Mr. Huey told her to. She gathered up the applications and took them home to complete. That is why the applications were turned in on different dates. She applied for the jobs because her attorney told her to. She did not think she could do the work.[107]

She only interviewed with IP; no one else called her back. She claimed that she also applied for the jobs listed in Mr. Sanders' 31 Jul 06 letter at Best Western, Byrd's Automotive, and Thousand Trails. Byrd's Automotive was on EX-28 and Claimant said there was another sheet that listed the other jobs. She said that EX-28 was a two-page document. She claimed that she provided it to her attorney, but her counsel did not have a second page. Regardless, she claims that she applied

[104] Tr. 107.
[105] Tr. 107-110, 129.
[106] EX-28.
[107] Tr. 110-114, 130, 138-139.

for all of the jobs around 5 Sep 06, less than two weeks prior to formal hearing. She admitted that she might not have had enough time to hear back from the jobs she applied for only two weeks prior. Therefore, she could not really testify about whether these jobs would hire her.[108]

Claimant denied that she waited six weeks before she started applying for the jobs Mr. Sanders provided in July 2006. She claimed that she started looking for those jobs as soon as she received the letter from her attorney. However, she admitted that she was not out actively looking before then. She said she did not look before then because she knew she was not able to do the work. She realized that she should have looked anyway. Although Mr. Sanders provided her names of jobs available on 16 Aug 06 – Mississippi Security Police, Wackenhut, and Best Security – Claimant could not find them. Her attorney could not find them either. Her attorney finally obtained the correct information and she went and applied for the Best Security position. She did not actively look for a job because she knew what she could and could not do with her knees.[109]

Just because Dr. Johansen said so, does not mean she is able to perform the jobs. She might go to work for a couple of days, but does not think she would last long. "[I]f he place me on this job that he find me it ain't going to do be a bit of good." The dishes she washes at church for 15 or 20 minutes is not really washing dishes. She does not clean the church. She does not do all the housework at home. She gets her own mail and pays her bills. She also does a little cooking and cleaning. She washes clothes, but 90% of the clothes go in the laundry. She presses very few of the items. She makes one bed. She does a little grocery shopping and some vacuuming and sweeping. She tries to go to the groceries when no one is there because she has to sit and wait too long. Sometimes, she uses the buggy to sit in. She tries to shop for at least three weeks. She gets the freezer bags and breaks it down. She did not buy bulk before her knee injuries. She does that now to keep from standing on her feet too much. The work she does around the house maxes her out.[110]

The week before formal hearing, Claimant applied for a job at Casa de Lola. A friend of Claimant's told her about the job. She went to Mobile about three separate times looking for work. She drove in her truck to look for the jobs. Someone went with her, but she drove. She also applied online at the Grand last week. Although there were help wanted signs everywhere she did not look for jobs after the hurricane. She knows the casinos have been having big job fairs for the public to come and apply for jobs. She did not go to any job fairs, she went to

[108] Tr. 114-117.
[109] Tr. 117-121.
[110] Tr. 121-123, 129-130, 134-135.

the casinos on her own. She did not go to any places listed in the classified and admitted that she does not read the newspaper. She did not look at any classified. She just went to different places and picked up applications. Claimant denied that she wanted to retire and testified that she was "not really ready to retire."[111]

Claimant would work if she could find something. She has been working her entire life and is not a lazy person. She has been working as long as she could remember – from the cotton fields to the cornfields. She would return to work if someone would hire her. However, looking for all these jobs has tired her out physically. She has been in bed by seven every night. She is just tired, drained, and her knee hurts. She has to keep it elevated on the couch or go to bed so she could stretch her knee. She has about two or three good days a week and the rest are bad. If she is on her feet too much, she has problems.[112]

Claimant has applied for Social Security. However, she still wants to work because there is not much for her to do around the house. She stated that she would probably continue to look for jobs while this decision is pending.[113]

She used to walk about four miles per day, but denied doing so since her last surgery. Now she only walks when she has to. She walks around her house, goes to pay bills or buy groceries. She cannot walk like she used to. Dr. Johansen has told her to walk a little. She does not walk more than she has to.[114]

Claimant testified via deposition in pertinent part that:[115]

As of 18 Mar 04, she was 59 years old. She lives with her 63 year old husband. Her husband is disabled due to high blood pressure and diabetes. She graduated from high school in 1964. She was an average student and can read and write. She never went to college, but went to vocational school for welding. She is a certified welder, but has no other certifications.[116]

She started working for Employer in October 1971 as a welder's apprentice. She worked as a welder's apprentice for two years, "until she topped out" and become a first class welder. She worked for Employer from 1971 until 1978, when she went to work for Chicago Bridge and Iron as a welder and pipe welder. She worked for Chicago Bridge and Iron for three years, but then got laid off. She

[111] Tr. 123-128.
[112] Tr. 128, 132-134.
[113] Tr. 128-129.
[114] Tr. 139-141.
[115] EX-25 (*see* fn. 3; the parties submitted Claimant's deposition as EX-25 and Claimant's supplemental deposition as EX-26. Counsel were informed that Claimant's depositions would be considered part of the administrative record; however, unless pages were specifically cited to by a witness or by counsel, at hearing or in briefs, it would not be considered part of the record upon which the decision would be based. No such citations were made to EX-26).
[116] EX-25, pp. 5-7.

then worked for Gulf City Fishery as a head shrimper and cleaned shrimps. She worked for Gulf City Fishery for about six months, but left because she did not like the money. She went back to Employer in 1985 and hired on as a welder. She started as a second class welder and after one year she got her first class rating. She worked as a welder from 1985 up until her injury.[117]

Most of her days are spent at home or walking. She walks about every other day for about four miles. She does not walk fast, just a steady pace. She also fishes at the bank or pond.[118]

When she was searching for suitable alternative employment, she advised her potential employers that she had work limitations. She was not asked about it specifically, but she put the information on her applications. She denied that she did not intend to look for a job if she received Social Security disability benefits. She testified that she was looking for a job "if somebody will hire [her]." Her problem is that nobody will hire her.[119]

Medical Evidence Related to Prior Injuries

Dr. John W. Cope's medical records state in pertinent part that:[120]

On 26 Feb 91, Claimant banged the anterior aspect of her right knee on a piece of angle iron. She had mild tenderness anteriorly, but no instability. Her x-rays were negative, as well as her McMurray's test. She was assessed with a knee contusion. She was given a knee brace, ANSAID, and was limited to light activities. On 11 Mar 91, Claimant's knee was improved. However, Dr. Cope kept her off work and continued the ANSAID and brace. She was referred for physical therapy for strengthening and mobilization.[121]

Claimant's knee continued to improve, but she still had problems. Per Claimant's request, Dr. Cope released her to return to work on 15 Apr 91. Claimant was ordered to report back in a few weeks for a possible referral for an arthroscopy. Claimant returned on 17 May 91 with continued complaints of problems with her knee. However, she was not interested in surgery. Dr. Cope continued her at work. Although Dr. Cope believed it would be safe for Claimant to return to work, he opined that she would eventually need arthroscopic surgery. Regardless, he released Claimant from active treatment.[122]

[117] EX-25, pp. 10-12.
[118] EX-25, p. 40.
[119] EX-25, pp. 47-48.
[120] EX-20.
[121] EX-20, p. 1.
[122] EX-20, pp. 3, 4.

Claimant returned on 24 Jun 91 without improvement. Dr. Cope again recommended arthroscopic surgery and scheduled it for 26 Jun 91. She returned on 2 Jul 91. Dr. Cope sent her to physical therapy for strengthening. He informed her that she may have some permanent difficulty with her knee particularly if returning to her previous job level.[123]

Claimant returned for a follow-up on 17 Oct 91. She continued to have problems with her knee. Dr. Cope opined that Claimant was near maximum medical improvement, but still had problems kneeling and crawling. Dr. Cope believed Claimant would reach MMI within the following weeks and issued a ten percent (10%) permanent partial impairment rating to her leg. He further opined that she may have difficulty resuming her previous job. He believed that she would do better off in the long run doing lighter duty work.[124]

She returned on 7 Nov 91 and Dr. Cope opined that she would reach MMI on 11 Nov 91. He believed she would do better in lighter duty work since patients with her type of knee problems tend to have difficulty in jobs that require a fair amount of climbing or kneeling. However, as of 31 Jan 92, Claimant remained off work because her knee continued to bother her. The physical examination revealed a fair amount of effusion. Dr. Cope reiterated to Claimant that he believed the condition of her knees and her job requirements were not compatible. On the other hand, Claimant believed she needed to work as long and as hard as she could regardless of its affect on her knees. Dr. Cope opined that it was becoming "increasingly clear that she is not going to be able to tolerate this over the long run."[125]

Claimant returned on 14 Feb 92. Although she had a flare-up, it did not affect the 11 Nov 91 date of MMI. Dr. Cope believed it was just the "expectable gradual deterioration in her knee function, as a result of the magnitude of the injury and her having continued to work." He again reiterated that he did not think she could tolerate continuing her usual job with her knee the way it was, but Claimant felt she needed to work and would try to return to work in March 1992. Regardless, Dr. Cope was not optimistic that she would be able to hold that level of activity down over the long run.[126]

As of 10 Apr 92, Dr. Cope believed that her missed time from work was a direct result of her original injury. He believed she was temporarily totally disabled, as a result of her work injury, for the work time she lost in January, February, and March 1992. If that requires that he move her date of MMI to 1992, then he would not object. MMI just means that she will not get any better, it does not mean that she could not get any worse.[127]

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[123] EX-20, pp. 3, 5.
[124] EX-20, p. 6.
[125] EX-20, pp. 7-8.
[126] EX-20, p. 9.
[127] EX-20, p. 10.

Claimant returned on 19 Nov 92, complaining about her knee swelling and hurting periodically. She asked for something for the swelling and pain. He prescribed an anti-inflammatory. There was no change in her permanent partial disability and Claimant continued to work. She did not return until 10 May 93 with complaints of intermittent flare-ups. She asked Dr. Cope to renew her anti-inflammatory and pain medication. He gave her a prescription for 30 Lortab, with no refills, and 60 Ansaid. Claimant returned on 29 Oct 93 because she was out of anti-inflammatories and pain medication. She reported a recent knee flare-up. There was no change in her permanent impairment.[128]

Claimant returned on 11 Aug 94 for a follow up regarding her right knee problems. The physical examination revealed no significant knee effusion. However, Dr. Cope found it difficult to assess her secondary to her size. There was some mild medial tenderness. X-rays were taken of her right knee and revealed mild degenerative changes without obvious progression from her previous films. She was assessed with early degenerative arthritis of her right knee and was prescribed anti-inflammatories.[129]

Medical Evidence Related to Current Condition

Dr. Arthur D. Black's medical records state in pertinent part that:[130]

> As of 22 May 00, Claimant had continued problems with her right knee and agreed that the timing was right for surgery. Dr. Black's impression was that Claimant had a right knee medial meniscus tear plus/minus arthritis. He wanted Claimant to have a right knee arthroscopy, probable meniscectomy, and chondroplasty.[131]
>
> She had surgery on 30 May 00. Dr. Black performed a right knee diagnostic arthroscopy; partial lateral meniscectomy; chondroplasty of the medial femoral condyle, patella femoral joint, and lateral compartment; and inserted a pain pump catheter. He opined that Claimant had a degenerative knee throughout. "There was diffuse Grade two with some areas of Grade three as well involving the medial femoral condyle, the lateral tibial plateau, the patella, and the trochlea. There was a degenerative tear at the periphery of the lateral meniscus. The medial meniscus was degenerated, but not torn." The physical examination revealed that she had an excellent range of motion and her portals looked fine. There was also minimal swelling in her right knee. He opined that she was doing well after surgery.[132]

[128] EX-20, p. 11.
[129] EX-20, p. 12.
[130] EX-22.
[131] EX-22, p. 1.
[132] EX-22, pp. 1-3.

She returned on 8 Jun 00, after her surgery to her right knee. He continued her off work status. Claimant returned on 13 Jun 00 with minor bruising and swelling, but no pain. He advised her to take it easy. Around 29 Jun 00, about one month post surgery, Claimant started to improve and feel better. Her physical examination revealed that her portals were fine, but she had a mild effusion in her knee. She had good range of motion. He continued her physical therapy and anti-inflammatories. He also kept her off work.[133]

Claimant returned on 20 Jul 00 and reported that she was doing much better than she was before the surgery. She had minimal, if any, effusion and her portals looked fine. She also had good range of motion. He released her to return to work on 31 Jul 00 with restrictions of no squatting and no working on her knees.[134]

On 14 Sep 00, Dr. Black assigned her a twelve percent (12%) permanent partial impairment of her right lower extremity secondary to the meniscectomy and arthritis. He continued her "permanent work restrictions" of no squatting and no working on her knees.[135]

Claimant returned on 8 Nov 00 to take care of her left knee. He initially worked on her right knee because it was worse than her left. She was happy with the results of the right knee surgery, but still had symptoms in her left knee especially when walking or going up stairs. The pain was on the medial and lateral sides of her knee and she wanted to have an arthroscopy of her left knee.[136]

The physical examination of her left knee did not reveal any effusion. She had crepitus under the patellofemoral joint. She also had one plus medial and lateral compartment tenderness. She had a positive McMurray that felt as if it was on her lateral side of her left knee. He opined that she had left knee arthritis and that the MRI reports a lateral meniscus tear, possible medial meniscus tear, and arthritis. He returned her to work on 8 Nov 00, with instructions that she would be placed off work status on 13 Nov 00, due to an upcoming left knee arthroscopy, until further notice.[137]

On 14 Nov 00, Dr. Black performed a left knee arthroscopy, partial medial and partial lateral meniscectomy, chondroplasy of the medial femoral condyle, chondroplasty of the trochlea and patella, and implanted a pain pump catheter. Claimant had degenerative tearing of the posterior horn of the medial meniscus

[133] EX-22, pp. 1, 4-5.
[134] EX-22, p. 5.
[135] EX-22, pp. 6-7.
[136] EX-22, p. 8.
[137] EX-22, pp. 8-9.

and degenerative tearing the mid and posterior horn of the lateral meniscus and softening of both menisci. She had grade II chondromalacia of 1 x 2 cm area in the medial femoral condyle. She also had grade II chondromalacia over a 3 x 3 cm area of the trochlea and a smaller area of the patella.[138]

After her surgery she returned for a follow-up on 16 Nov 00. She had no major complaints. However, she said she had some difficulty walking. Her portals looked fine, but she had a moderate effusion in her left knee. On 22 Nov 00, Claimant was one week out from her surgery and was doing well, but had complaints that her leg gave way. She had an expected range of motion in her left knee and mild effusion. Her portals looked fine. He started Claimant on a physical therapy program and continued her on no work status. Claimant continued to improve post surgery. On 13 Dec 00, Dr. Black reported that she had an excellent range of motion. However, she had some quadriceps atrophy. He continued her physical therapy program and kept her off work.[139]

Claimant returned on 18 Jan 01. Her main problem was that there was still popping and crunching in her superolateral aspect of her left knee. It bothered her when she straightened her knee and when she got up. She also had some problems with her right knee because she was favoring the right knee in light of her recent left knee surgery. The physical examination revealed some crepitus and clunking under the patella and around the lateral aspect of the patella. It felt like tissue and not just crepitus. She also had a small left knee effusion, but full range of motion. He gave her cortisone injections in both knees.[140]

On 19 Feb 01, Claimant reported that her knees were much better after the cortisone injections. However, they continued to bother her. Her left knee was tender on the medial side when she squatted, got on her knees, or was active. Her knees felt better when she rested. Regardless, the pain had diminished. She had a full range of motion in her knees, but there was some mild medial compartment tenderness and mild patellofemoral crepitus. Her knees were stable. He diagnosed her with arthritis in both knees, but that she was doing better post cortisone injections. He opined that she could return to work on 26 Feb 01, with restrictions of no climbing, no squatting, and no working on her knees.[141]

Claimant returned on 19 Mar 01. Dr. Blaco reported that "her knees certainly are not normal." Although her knees bothered her when she worked, at the time it was something she could tolerate. Her pain was primarily in the back of her right and left knees. The pain worsened with activity and she felt better with rest. Her right knee had a small effusion and there was some patellofemoral crepitus. She

[138] EX-22, pp. 10-11.
[139] EX-22, pp. 8, 12-13.
[140] EX-22, pp. 13-14.
[141] EX-22, p. 15.

also had one plus medial compartment tenderness. She had a full range of motion in her right knee and normal stability. Her left knee had mild effusion and mild patellofemoral crepitus. She also had medial compartment tenderness, but with normal stability and strength. Dr. Black released Claimant from care regarding her left knee and assigned her an MMI date of 19 Mar 01. He also assigned a total permanent partial impairment of ten percent (10%) to her left knee. Claimant had no permanent work restrictions.[142]

On 16 May 02, Claimant returned with bilateral knee pain that was worse on the left. She reported episodes of her left knee giving way. She had bilateral medial and lateral joint line tenderness. She had pain with activities and mild swelling. Her knee problems were affecting her daily living activities and she was considering a knee replacement. Dr. Black opined that she had bilateral knee arthritis with temporary relief from arthroscopic surgery. He reported that her symptoms continued to improve. Regardless, he referred her to Dr. Drake, a specialist in total knee arthroplasty, for possible treatment intervention. Dr. Black believed Claimant's work related injuries had an impact on her arthritis, but was certainly not the sole cause.[143]

Dr. R. Lance Johansen's testified by deposition and his medical records state in pertinent part that:[144]

He is a joint replacement surgeon and orthopedic doctor. He has seen Claimant multiple times, the first time being 3 Jul 02. Dr. Black referred Claimant to Dr. Johansen because she had severe knee problems, had arthroscopic surgery, multiple injections, and multiple procedures. He reviewed her medical records.[145] He knew she had a bilateral knee injury on 16 Dec 99. However, he also knew that she had received treatment to her knees prior to her work accident. Some of her previous treatment was unclear, but he believed she had knee surgery as early as 1985 and that Dr. Black performed arthroscopic surgery on her right knee on 30 May 00 and on her left knee on 14 Nov 00. He also knew that she had arthroscopic surgery on her right knee in June 1991.[146]

He reviewed her old medical records from Dr. Cope. They reflected that Claimant had a right knee injury on 16 Feb 91 and arthroscopic surgery in June 1991. She was assigned a 10% disability rating to her right leg on 11 Nov 91. Despite reaching maximum medical improvement, Claimant gradually deteriorated and kept having flare-ups and knee pain from 1992 until 1994. On 11 Aug 94, Dr. Cope noted degenerative changes. An additional procedure was performed on 30

[142] EX-22, p. 16.
[143] EX-22, p. 17.
[144] EX-27; EX-23.
[145] Although Dr. Johansen testified that he reviewed Claimant's prior medical records, he also admitted that he was not sure what he exactly had because all of the records were destroyed in Hurricane Katrina.
[146] EX-27, pp. 4-7, 13.

Oct 96. Based on his review of the records, Dr. Johansen opined that Claimant's pre-existing right knee injury from 18 Feb 91 combined with and contributed to the effects of any injuries she had on 16 Dec 99 to make her materially and substantially more disabled than she would have been as a result of the 16 Dec 99 injury alone. Combining the previous injuries may have accelerated the 1999 injury, but Dr. Johansen could not opine as to the extent it contributed. He just stated that it was certainly a contributing factor.[147]

Dr. Johansen examined Claimant on 31 Jul 02. The examination revealed severe pain in her knee, with reasonably good, but markedly diminished, range of motion. There was severe grinding on the knee throughout range of motion, with patella femoral crepitation and 2+ effusion in both knees. Her gait was thrusting and antalgic. He diagnosed her with severe arthritis of bilateral knees. He could not opine as to whether some of the arthritis pre-existed her 1999 work injury because sometimes arthritis is rapidly progressive and can occur within three to four months. In addition, arthroscopy surgery takes out some of the meniscus, which decreases the joint space. Claimant has had a degree of post-traumatic arthritis. However, based on Dr. Johansen's review of Dr. Black's operative report, it is not clear what the amount of post-traumatic arthritis or traumatic shearing of the cartilage she had at those injuries. It is a medical possibility, but not a certainty.[148]

Upon examining Claimant on 31 Jul 02 and the failure of conservative treatment, Dr. Johansen concluded that Claimant needed bilateral knee replacements. He performed a total right knee replacement on 3 Sep 02. She had severe degenerative joint disease in her right knee. She was ordered to use a walker. She returned on 17 Oct 02 and reported doing well, with minimal pain. However, she reported problems with her left knee. She had severe and progressive pain in her left knee. Her right knee was heeling well. He performed a total left knee replacement on 30 Dec 02. Both procedures went well until her left knee stretched out and he had to go back and change the polyethylene in her left knee. Claimant had a functional capacity evaluation performed on 30 Jun 03. It reflected that Claimant is capable of performing light work. He assigned Claimant a 15% impairment rating to the whole body and 37% for each lower extremity, which corresponds to a combined 22% for the whole body and 15% for bilateral lower extremities. He later testified that Claimant has 35% impairments to each lower extremity and a 50% whole body impairment.[149]

Claimant was discharged from the hospital following her December 2002 surgery, with instructions to ambulate with a walker and to begin physical therapy. She began physical therapy in January 2003. She had decreased range of motion, strength, and function of her left knee. She progressed rapidly with physical

[147] EX-27, pp. 19-25.
[148] EX-27, pp. 7-9; EX-23, p. 3.
[149] EX-27, pp. 9-13, 27; EX-23, pp. 3-34.

therapy and remained independent of her walker. As of 7 Apr 03, she continued to do well, but had increasing pain in her calf. She continued physical therapy and tolerated the treatment.[150]

She returned on 16 Jul 03 for a follow up and reported doing well. She had some pain in her left knee, but no problems with her right. On 5 Sep 03, Dr. Johansen reported that Claimant was close to maximum medical improvement. He concluded that Claimant reached maximum medical improvement on 27 Oct 03. He agreed with the permanent work restrictions from the FCE evaluation. Claimant continued to improve.[151]

She started having increased pain in her left knee and on 22 Apr 04, she reported increasing severe pain in her left knee that was lasting longer. On 29 Apr 04, Dr. Johansen examined Claimant and concluded that she needed a revision of the total left knee replacement. He performed that procedure on 3 May 04. He opined that she had a failed left total knee replacement. He believes that she got a good result from the revision. He tightened the knee up and replaced the liner that had a crack in it. Claimant restarted physical therapy and tolerated the treatment well.[152]

A physical examination on 10 Sep 04 revealed that Claimant had excellent range of motion of her bilateral lower extremities. He once again released Claimant at maximum medical improvement on 3 Mar 05, with restrictions of no lifting more than 65 pounds and no kneeling, squatting or crawling. He assigned a 15% whole body impairment and a 37% left lower extremity impairment rating. He recommended periodic anti-inflammatories and released her to return to full duty work. Her impairment ratings remained the same. Claimant's condition has remained stable since 3 Mar 05. He did not know whether Claimant ever returned to work. Claimant says she cannot do her usual work as a welder. He was aware that her FCE showed she was capable of light duty work regardless of his clearance for Claimant to return to work full time. It was Dr. Johansen's hope that Claimant return to work for Employer. Claimant can work so long as she works within the restrictions he assigned to her. He understood that his 65 pound lifting limit is the upper edge, but he has had patients who could do it. That is why he gave her the option. He released her with the most he could allow her to do.[153]

He opined that Claimant could lift 65 pounds because that tends to be the maximum amount longshoremen have to lift. He has increased those limits in some individuals and they have done well, especially with the newer type components that have extended wear life and can tolerate a little more weight. However, the FCE recommended light duty work a 20 pound maximum lift floor

[150] EX-23, pp. 34-50.
[151] EX-23, pp. 56-61.
[152] EX-27, pp. 13-16; EX-23, pp. 62-74.
[153] EX-27, pp. 16-18; EX-23, pp. 75-78.

to thigh and 25 pound maximum lift from thigh to shoulder. Dr. Johansen believes the FCE is reasonable, but explained the difference of opinions with it "may have not had a good week." He believed if the FCE was redone, it would probably show something different. He gave Claimant the "highest potential activity that [he] thought that her components could take." What he offered to patient as her capabilities is not necessarily what she could physically and mentally do, but the knee replacement would allow that to be the maximum thing she could do.[154]

Therefore, the 65 pound lifting restriction he placed on Claimant relates to the maximum weight the components could take. However, it is not necessarily what he would recommend she do everyday. He believes with Claimant's physical condition and mental status she would best be served with a 20 to 25 pound weight limit with limited kneeling, squatting, and crawling. He also believes she would be best suited in a sedentary type job where she would only have to move a minimal amount and be able to elevate her legs if she had pain. She could not do a job where her medication would affect her ability to work. There are plenty of jobs that would not be affected by her condition. He believes a career change would be positive for her from a mental standpoint. Claimant liked her job as a welder and Dr. Johansen believed she has given up.[155]

Dr. Johansen believed that if "she could get over some of this that she may be able to go back and do some light duty and become part of the workforce again." He does not believe she could contribute at the level she was before her injury. Claimant did an impressive amount of work as a welder. Dr. Johansen admitted that her return to the workforce is contingent upon someone offering her a job, but if a person cannot get a job right now in South Mississippi, then it is because they were not looking. Her ability to return to work is also contingent on her wanting one and being motivated to diligently try to find one. He believes that Claimant would benefit from returning to work in some capacity.[156]

Claimant's pain is more of an issue with her left knee. She still has a bit of pain in her left knee, but the surgery provided a good result. He would allow Claimant to return to any job as long as it fits within the restrictions he assigned. He opined that she would probably do better in a light duty setting and that doing heavy labor like she used to may be hard on her. Although heavy labor is something that she possibly could do, Dr. Johansen did not believe her confidence would allow her to. There is no reason why she could not do light duty work. It would be good for Claimant mentally, physically, and therapeutically for her to return to gainful employment.[157]

[154] EX-27, pp. 27-29.
[155] EX-27, pp. 29-31.
[156] EX-27, pp. 31-32.
[157] EX-27, pp. 18-19.

Dr. Johansen is not a vocational rehabilitation specialist, but has an interest in workers' compensation work. He reviewed the jobs the vocational counselor located as suitable alternative employment and determined that Claimant could work the cashier position as long as she could use a stool periodically. She could also work as a security guard as long as she does not have to run after people. She would have to use her gun more than a mallet. The transportation dispatcher would be a reasonable job for Claimant. Claimant would be better at checking customers in at the car wash job than she would be at stooping down and washing cars. The vocational reports were dated 6 and 9 Aug 06 and Dr. Johansen would release her to perform those jobs, or at least attempt them.[158]

It is possible that without the pre-existing degenerative changes and pre-existing surgery, there may not have been as many or as significant surgeries as were ultimately necessary. However, Dr. Johansen stated that he was not the treating physician and the record was not clear. It is also possible that in the absence of any pre-existing surgery or degenerative changes, that Claimant's limitations may not be as severe as they currently are. Claimant's current limitations are significantly more than one would expect for a knee replacement patient, which has resulted in her not being able to return to her gainful employment.[159]

Taking Lortab can cause problems with a patient's pain threshold, which is a known factor for returning back to gainful employment. She was on those medications for 10 years before her surgery. Had she not had prior knee injuries, her current injuries possibly would not have progressed as fast as she did. However, that is just a theoretical possibility.[160]

At a minimum, Claimant could certainly work within the confines of the FCE, which allows her to do light work. In addition, Claimant may be best served with vocational rehabilitation or job retraining. He is confident that Claimant cannot return to her usual employment.[161]

Claimant returned on 26 Apr 06 with complaints of left knee pain. However, the physical examination revealed that the surgical scars were healing nicely and Claimant had good range of motion, strength, and stability with no tenderness to either knee. Radiographs were taken of the knees and demonstrated excellent alignment of the components with no acute bony abnormality.[162]

[158] EX-27, pp. 19-21.
[159] EX-27, pp. 25-26.
[160] EX-27, pp. 26-27.
[161] EX-27, pp. 32-34.
[162] EX-23, pp. 79-80.

The Functional Capacity Evaluation dated 30 Jun 03 states in pertinent part that:[163]

> Claimant gave her maximum effort and there was no evidence of symptom magnification. The FCE reflected that Claimant could work light duty, with restrictions of lifting, carrying, pushing and pulling 20 pounds occasionally, frequently up to 10 pounds, and a negligible amount constantly. She could not carry more than 20 pounds and could lift 15 – 25 pounds. Claimant had decreased range of motion in both knees. She also had increased inflammatory responses when comparing joint line girth. She did not perform the kneeling, crawling, or step ladder tests because of safety concerns of the testing therapist. She could not get up off the floor by herself.[164]
>
> The FCE reflected that she should avoid kneeling, crawling, and climbing. She could occasionally squat, balance, stand, walk, alternate between sitting and standing, use foot controls, climb stairs, and do repetitive squats. She could frequently bend, reach above shoulders, use her right and left foot, and do repetitive bending. She could continuously sit and use hand controls. Although Claimant demonstrated good strength, measurements reflected increased inflammatory response with both knees. She had decreased range of motion in the trunk flexion and bilateral knee flexion.[165]

Vocational Evidence

Tommy G. Sanders testified live at trial and his vocational reports provide in pertinent part that:[166]

> He is a certified vocational rehabilitation consultant. He is also a licensed professional counselor in Mississippi. He was previously a vocational expert with the Social Security Administration and has been providing services in the private sector since 1981.[167]
>
> He obtained a history from Claimant, including her age, education, vocational background and medical limitations. Although he did not actually meet with Claimant, he read both of her depositions and her medical file. He also reviewed Claimant's employment records. Claimant is a 62 year old female with a high school education. She has worked at a parachute factory as a sewing machine operator. She also worked for a catering company, preparing and serving meals. However, her primary work is as a welder.[168]

[163] EX-23, pp. 51-55.
[164] EX-23, p. 51.
[165] EX-23, pp. 51-55.
[166] Tr. 142-160; EX-24 (reports).
[167] Tr. 142-143.
[168] Tr. 143-145; EX-24, p. 3.

Based upon his review of her medical records, Dr. Johansen first claimed that Claimant could lift up to 65 pounds. However, he then waned from that opinion and opined that she could lift 20 to 25 pounds and should avoid repetitive squatting, kneeling, and crawling. Dr. Johansen returned to the restrictions outlined in the FCE. Mr. Sanders considered Dr. Johansen's restrictions in making a determination as to what Claimant could physically do from a medical standpoint. Based on Claimant's age, education, vocational background and medical limitations, Mr. Sanders believed Claimant is qualified to work at entry level, sedentary or light, primarily unskilled jobs. She may also be able to work at the lower end of semi-skilled occupations.[169]

Based on this opinion, Mr. Sanders performed labor market surveys and identified suitable alternative jobs in Claimant's geographic area. Dr. Johansen's deposition disqualified the Winn Dixie cashier position he located. Otherwise, none of the jobs he located were disqualified by Dr. Johansen. The labor market survey he completed identified jobs available from June 2003 through 3 May 04. He also identified jobs available from 3 Mar 05 up through the formal hearing. Based upon the labor market surveys, Mr. Sanders believes Claimant is capable of earning anywhere from $215 to $320 per week if she diligently tried to get a job.[170]

The Singing River Hospital job he located was available for 40 hours per week at $7.00 per hour. Claimant would have to pick up menus from patient's rooms and return them to the cafeteria area. She would also have to take calls from patients regarding complaints about the menus or food served. She may also have to carry trays of food to patients. The job with Munro Petroleum was hiring workers for 24-38 hours per week at $6.00 per hour. At Munro Petroleum she would have had to operate the cash register and credit card machine. She would not have to stock, but could assist the attendant with stocking. The job with Swetman Security was hiring workers for 16-40 hours per week at a rate of $5.50 to 7.00 per hour, depending on the job site. Some of the security positions required only gate guard duties, while others required guards to walk rounds.[171]

Mr. Sanders did a follow-up labor market survey on 13 Apr 04. Per the 30 Jun 03 FCE, Mr. Sanders assumed that Claimant was capable of performing a range of sedentary to light physical activity. He located jobs at Classy Chassis Car Wash, Singing River Hospital, and Big K.[172]

[169] Tr. 145-146; EX-24, p. 15.
[170] Tr. 146-147; EX-24, pp. 3-5.
[171] EX-24, pp. 4-7, 10.
[172] EX-24, pp. 11-12.

Classy Chassis Car Wash was hiring two 40 hour per week cashiers at $5.15 per hour. At the car wash, Claimant would have to operate a cash register and credit card machine for car wash purchases and/or accessories. She would also have to balance the cash drawer and may have to stock items such as air fresheners and key chains. She would be able to sit and stand as needed, and would only have to lift about one to five pounds occasionally. She would also have to occasionally/infrequently bend, stoop, and squat.[173]

Singing River Hospital was hiring a 40 hour per week security officer at $7.00 per hour. Claimant would have to direct visitors to appropriate areas. She would be able to sit or stand at the booth at the entrance of the hospital. She would also have to walk rounds for about 10-20 minutes per hour and complete an end of shift report. The rest of the time she would have latitude to sit or stand.[174]

Big K was hiring a 40 hour per week cashier at $6.00 per hour. Claimant would have to assist customers with convenience store items and operate cash register and credit card machines. She could sit on a stool behind the counter when not waiting on customers. Although the morning crew usually stocks coolers, she may have to pull items forward. She would not have to lift more than five to 10 pounds, push and pull occasionally and occasionally bend, stoop or squat. She would also have to perform infrequent overhead activity and could alternate between sitting, standing, and walking.[175]

A third labor market survey was performed on 31 Jul 06 using the same restrictions as outlined in the 30 Jun 03 FCE. He located jobs at Best Western, Byrd Automotive, and Thousand Trails.[176]

Best Western was hiring a 40 hour desk clerk trainee at $7.00 per hour. Claimant would have to answer phones, greet and book guests, and register and check out guests. She would have to make change, process credit card payments, and clean the counter area and vacuum the lobby. She would be provided training for the Best Western position. She would only have to push and pull 10 to 15 pounds infrequently (i.e. vacuuming), routinely lift one pound, and could alternate between sitting, standing and walking with latitude. The job at Best Western would require frequent use of the upper extremities.[177]

Byrd's Automotive was accepting applications for a full time dispatcher at $7.00 to $8.00 per hour. A dispatcher would have to accept inbound calls from people who need their cars towed. The dispatcher must obtain information regarding the type of vehicle, address, phone number and name, then provide that information to

[173] EX-24, p. 11.
[174] EX-24, p. 11.
[175] EX-24, p. 12.
[176] EX-24, p. 13.
[177] EX-24, p. 13.

the tow truck driver. She would also have to empty the trash. The dispatcher position is a sedentary position, but Claimant would still have the ability to stand and move about.[178]

Thousand Trails was hiring numerous full time appointment clerks at $8.00 per hour, plus commission. Claimant would have to contact individuals who had left their name and number to schedule tours at various camping preserves throughout the United States and Canada. The job is a sedentary position. Claimant could utilize headsets, which would allow her the ability to stand and move around. Training is provided.[179]

On 9 Aug 06, Mr. Sanders reported that Treasure Bay Casino was hiring two 40 hour transportation dispatchers at a rate of $6.50 per hour. Claimant would have to communicate with limos and shuttle bus drivers through a two-way radio. She would have to accept incoming valet tickets and distribute tickets to valet attendants to return vehicles to the customers. There are minimal lifting requirements, with frequent use of her upper extremities. The job entails frequent sitting, with the ability to occasionally stand and walk. There were also two full time cashier positions available at Winn Dixie for $5.50 per hour. A cashier at Winn Dixie would have to scan groceries, weigh fruits and vegetables, operate and balance cash registers, and make change. She would also occasionally have to assist in bagging groceries and disinfect the conveyor belt. Lifting at Winn Dixie was described as one to 20 pounds occasionally and frequently one to ten pounds. The job also entails frequent standing, occasional walking, slight forward flexion, and frequent use of the upper extremities.[180]

Based on recent limitations assigned by Dr. Johansen, Mr. Sanders completed another labor market survey. He located three separate security guard positions with Mississippi Security Police, Wackenhut Security, and Best Security. Each position paid $8.00 per hour. The duties at Mississippi Security required the employee to sit and stand at the front entrance to monitor vehicles entering and exiting, maintain a log book, utilize a two way radio, sweep the guard shack, wipe off the table, and empty trash. The job would allow for occasional standing, sitting and walking, infrequent bending, and lifting from one to five pounds. The job at Wackenhut would require her to make hourly 15 to 25 minute rounds, log visitors in and out, and weigh trucks as they enter the facility. She would only have to occasionally stand, sit and walk, with infrequent pushing and pulling of two to 10 pounds and routine pushing and pulling one to two pounds. Best Security wanted workers to make 10 to 15 minute rounds every hour, and lift two to five pounds.[181]

[178] EX-24, pp. 13-14.
[179] EX-24, p. 14.
[180] EX-24, p. 16.
[181] EX-24, pp. 17-18.

A stool would have been made available for Claimant for the cashier jobs he located. The security guard positions he located would not have required Claimant to apprehend or get into altercations with people. The policy is to call the police if there is a problem.[182]

Mr. Sanders reviewed Claimant's two depositions and heard her testimony at formal hearing. Based on Claimant's testimony, Mr. Sanders does not believe Claimant diligently sought suitable alternative employment because there is such a long period between when she actually looked for work. She should have looked for a job eight hours a day, five days a week, like an actual job. She should not have waited for her attorney to tell her to look for a job. She should not solely rely on another person to find her a job. She should have a positive attitude when applying for jobs. She should not volunteer information about prior workers' compensation claims or restrictions. The American Disabilities Act does not require that she voluntarily disclose her restrictions.[183]

One way to narrow down places to look for jobs which are hiring is by looking at want ads. Claimant did not look at want ads. If someone was diligently seeking work he would expect that want ads would be the primary source. Although Claimant testified that she does not believe she can work, her medical limitations reflect otherwise. Based on her age and education, Mr. Sanders believes Claimant is capable of doing all of the jobs he listed in the labor market survey, except for the position at Winn Dixie. Claimant could not be a greeter at Wal-Mart because it would require that she stand all day and she cannot. She also probably could not do the housekeeping job that she applied for on her own.[184]

Mr. Sanders agreed with Dr. Johansen's statement that if people are not working it is either because they already have a job or they do not want to work. Since the hurricane, a lot of employers have relaxed their requirements and made more concessions. He compared it to the shipyards in the 1970s - "if you have a heartbeat you could get hired." Mr. Sanders believes there are still a lot of jobs available for Claimant. If Claimant diligently tried and really wanted to work, Mr. Sanders believed she could.[185]

The reports were all completed prior to Mr. Sanders ever seeing Claimant. He never spoke to her. He did not know she had a stutter. He could not guarantee that anyone would hire a 62 year old woman who had three knee replacements. However, it is probable that she could get a job if she diligently tried. He also issued the labor market surveys before he read Dr. Johansen's deposition. The

[182] Tr. 147-148.
[183] Tr. 148-150.
[184] Tr. 150-151.
[185] Tr. 151-152.

labor market survey was prepared for Employer and the Court. It was not completed to find Claimant a job. Dr. Johansen never responded to a request to approve the jobs Mr. Sanders identified as suitable alternative employment.[186]

Even though Claimant contacted a variety of business looking for work, she did not get offered a position at any of them. In his experience, when somebody applies for employment the issue of where they last worked comes up. If it comes up on the application, he counsels people to put "still employed, and will discuss during interview." Although shipyard welders make much more than minimum wage, Mr. Sanders stated that the applicants can discuss that during the interview. There could be numerous reasons a person is changing jobs, but an applicant cannot get around the fact that the injury occurred on the job.[187]

When he located the available jobs, he specifically advised the potential employers that he had a 62 year old woman with a high school education who primarily worked as a welder prior to her work injury and had surgery on her knees, before asking if they would consider hiring her. He does not just look at the want ads and determine which jobs she could do. The only thing he did not advise potential employers about was her stutter because he did not know about it. However, he believes Claimant testified well. He only heard her stutter one time so he did not believe it would be a factor in hiring her. If she got nervous in the transportation dispatcher job it could cause a problem, but he did not see her stutter being a barrier for the other jobs he located. In locating jobs for Claimant, Mr. Sanders took Claimant's FCE as the baseline of what she could physically do.[188]

Mr. Sanders' job developer contacted Best Security. In fact, someone else called the employers listed in the reports. Therefore, he does not know exactly what the potential employers were asked or what they said. However, he knows what his job developer routinely does. She does not usually provide incorrect addresses. Although some of the jobs were not located until one year after the hurricane, she put down the pre-Katrina addresses.[189]

ANALYSIS

This case presents not only an issue regarding a medical opinion, but also "mingled elements of fact[s], medical opinion[s] and inference[s]."[190] The instant record consists of medical opinions coupled with the testimony of Claimant and a vocational expert.

[186] Tr. 152-155.
[187] Tr. 154-155.
[188] Tr. 155-157.
[189] Tr. 157-158.
[190] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Average Weekly Wage

Claimant regularly worked 40 hour weeks. She earned time and one-half when she worked more than eight hours or on Saturdays. She earned double time if she worked Sundays or on holidays. Her paid holidays consisted of Labor Day, Thanksgiving, Christmas, Easter, and Good Friday. Her holiday pay accrued with the number of hours she actually worked. As Easter is always on a Sunday, Claimant was given the following Monday off as the paid holiday. She received two days off for Thanksgiving and about 8 days for Christmas. She took all her vacation and holidays off and did not sell back any of her days.

The parties agree that using Section 10(a) is appropriate as Claimant worked substantially the whole year as a five-day per week worker. A careful review of the wage record[191] reflects that from 16 Dec 98 through 15 Dec 99, Claimant earned a total of $29,661.33. Claimant actually worked on or received holiday pay for 222 days. She also received pay for 18 vacation days (144 hours / 8 hours = 18 days).[192] The sum of days actually worked, paid holidays, and paid vacation days totals 240 days and is the proper divisor for her average daily wage. Accordingly, under Section 10(a), Claimant's average weekly wage is $617.94 ($29,661.33/240 = $123.59 x 260 = $32,133.11/52 = $617.94).

Nature and Extent of Disability and Suitable Alternative Employment

Since Claimant is clearly unable to return to her original job, she is presumed totally disabled until Employer establishes available suitable alternative employment.[193] Claimant has already received temporary total disability compensation benefits for: 26 May 00 through 30 Jul 00; 13 Nov 00 through 25 Feb 01; 31 Aug 02 through 25 May 03; and 5 May 04 through 15 Mar 05.[194]

Claimant contends she was entitled to temporary total disability benefits from 31 Aug 02 through 3 Mar 05, the date she reached maximum medical improvement. She also seeks permanent total disability benefits from 4 Mar 05 to present and continuing.

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[191] EX-5 (the Court reviewed each entry in the wage report, from 16 Dec 98 through 15 Dec 99, to calculate Claimant's annual earnings and the number of days worked, including paid holidays and vacation days, in order to calculate Claimant's average weekly wage under Section 10(a)).

[192] The Court did not consider two separate entries for one day, totaling 8 hours, as more than one day. In addition, where Claimant received time and one-half for working either on Saturdays or over eight hours, the Court only considered those time entries as one day. Claimant's vacation days were calculated by adding the total number of hours paid for vacation by 8 hours, the number of hours she works in a typical work day.

[193] There were post injury periods when Claimant did return to work for Employer. Even though she was unable to do the same physical tasks, she was paid the same as before her injury. To the extent she was at that time temporarily partial disabled in light of the suitable alternative employment provided by Employer, she suffered no loss in her post-injury earning capacity.

[194] JX-1.

Claimant further contends that she was unable to return to work in any capacity and should have remained temporarily totally disabled until 3 Mar 05, when she last reached maximum medical improvement.[195]

Employer asserts that it has established the availability of suitable alternative employment, which Claimant failed to diligently pursue. Employer therefore contends that Claimant is limited to a scheduled award for her bilateral knee injuries of 16 Dec 99.

Since Claimant was and is clearly unable to return to her usual employment as a welder, the central questions become: (1) Did Employer demonstrate suitable alternative employment, and if so, did Claimant diligently try to find work with no success. (in other words did Claimant's disability become total at any point)? (2) At what point, if any, did Claimant's disability become permanent (and partial) so that she was entitled only to a scheduled award?

Claimant is a 63 year old woman, with a high school education. She speaks with a stutter, but can read and write.[196] She has worked as a welder for substantially her entire adult life. She first went to work for Employer in 1971 and after a break to work elsewhere, she returned in 1985. She has been continuously working for Employer ever since. Claimant has no appreciable specialized vocational skills, other than welding.

Following her stipulated benchmark injury in December 1999, Claimant had surgery on her right knee in May 2000. The medial meniscus was degenerated, but not torn. In September 2000, Dr. Black assigned Claimant a 12% permanent partial impairment to her right lower extremity secondary to the meniscectomy and arthritis. He placed a permanent work restriction of no squatting and no working on her knees. A couple of months later, he performed a left knee arthroscopy to address degenerative tearing and chondromalacia. Dr. Black released her from his care with an MMI date of 19 Mar 01, a 10% permanent disability rating as to her left knee, and no permanent work restrictions.

Fourteen months later, Claimant returned to Dr. Black with bilateral knee pain. He opined that she had bilateral knee arthritis with temporary relief from the arthroscopic surgeries and referred her to Dr. Johansen, a specialist in total knee arthroplasty. Dr. Black believed Claimant's work related activities and injuries were a factor in her arthritis, but was not the sole cause.

[195] Claimant previously reached MMI on 14 Sep 00 and 19 Mar 01. However, she subsequently needed knee surgeries which placed her back on temporary disability status.
[196] The stutter was not so pronounced to be a significant impediment to her testimony at hearing.

31 Aug 02 through 3 Mar 05

On 3 Sep 02, Dr. Johansen performed a total right knee replacement to treat Claimant's severe degenerative joint disease. He ordered her to walk with a walker. He performed a total left knee replacement on 30 Dec 02.

Following a period of recovery and rehabilitation, Claimant underwent an FCE on 30 Jun 03. It reflected no symptom magnification or exaggeration. It indicated she was capable of performing light duty work, with restrictions of lifting no more than 15 – 25 pounds and carrying no more than 20 pounds. She was also restricted from kneeling, crawling, or climbing. Dr. Johansen assigned her a 15% permanent impairment rating to her whole body and 37% for each lower extremity, "which corresponds to a combined 22% for the whole body and 15% for bilateral lower extremities." He also testified that she had a 35% impairment to each lower extremity and 50% whole body impairment.

Claimant tolerated the knee replacements well and continued to improve with physical therapy. However in July 2003, she complained of pain in her left knee, although she did not have any problems with her right knee. Dr. Johansen determined that Claimant reached MMI on 27 Oct 03 and adopted the permanent work restrictions from the FCE evaluation.

However, Claimant continued to suffer from increased pain in her left knee. Dr. Johansen eventually performed a total left knee revision on 03 May 04 to correct the failed total knee replacement. Claimant tolerated the revision well and he re-released her as at MMI on 3 Mar 05, with restrictions of no lifting more than 65 pounds and no kneeling, squatting, or crawling. He assigned a15% whole body impairment and 37% left lower extremity impairment rating. He released her to full duty work. At times, Dr. Johansen did not adequately distinguish in his opinions between what load he thought the actual hardware he had installed in Claimant's knee could handle and what Claimant as a whole patient could do.

Dr. Johansen conceded that the FCE could underestimate what Claimant can do if she did it on a "bad day." Nonetheless, he opined that she would do best if limited to no lifting more than 20 to 25 pounds with limited kneeling, squatting, and crawling. He also opined that she would do best with a sedentary position requiring minimal movement and allowing her to elevate her legs if she had pain. He further opined that she could not do a job where her medication would affect her ability to work.

Dr. Johansen specifically opined that the left knee replacement failed and did not provide Claimant relief. Given the failure of the left knee replacement, Claimant did not reach MMI until 3 Mar 05. She remained temporarily disabled from 31 Aug 02 until 3 Mar 05.

In as much as the evidence is clear (and Employer does not dispute) that Claimant was unable to continue her usual employment as a welder due to her compensable knee injuries, she has established a *prima facie* case of total disability for 31 Aug 02 through 3 Mar 05. Consequently the analysis turns to whether Employer established suitable alternative employment.

The vocational expert, Mr. Sanders, reviewed Claimant's medical records and determined that she would be best suited for an entry level sedentary or light position. Those restrictions were within the then applicable limitations placed on Claimant by her treating physicians.

He identified jobs that were consistent with those limitations and available from 30 June 2003 through 3 May 04. He also identified jobs available as of 3 Mar 05. However, the job with Classy Chassis Car Wash is not suitable alternative employment because it would require that Claimant occasionally bend and squat, which she is restricted from doing. Claimant applied for the job at Singing River Hospital on 4 Oct 03 and was never contacted for an interview or offered the job. Even though Claimant did not apply for the job with Singing River Hospital until more than 3 months after it was identified, the Court finds that based on her working restrictions, Claimant could only walk occasionally and the job would require her to continuously walk from patient rooms to get menus and return them to the cafeteria. She would also have to carry trays of food to patients. Claimant could not perform this job because of her restrictions and therefore it is not suitable alternative employment.

The labor market survey did not reflect that the cashier positions were willing to train new employees. Claimant testified that she has never worked as a cashier and has never used a computerized cash register or done credit card charges. Without evidence that the employers would be willing to train Claimant to use cash registers, these jobs are not suitable alternative employment.

Claimant's testimony was credible and there is no significant suggestion in the evidence that she was magnifying symptoms or malingering. She was most candid and credible when she testified that even though she applied for jobs, and would try them, she did not believe she could do them. On the other hand it is clear that her condition has become much worse since her left knee revision and jobs that might have been feasible before the revision are no longer so. It is difficult to distinguish Claimant's testimony between her description of her current condition and her condition before the revision. She does not believe she can work a 40 hour work week because of standing. She further testified that standing, walking and "getting in and out of places" increases her pain in her left knee. All activities make her knee swell. She needs to wear shorts to let her knee breath in case it swells. She stopped looking for jobs when she was re-pulled off work for her total left knee revision.

Claimant states she applied for a job with Restoration, a nursing home in October 2003. The job was not listed on the labor market survey. She also says she applied for jobs at the Holiday Inn, Schuler Company, Best Western, Michaels, and Singing River Hospital. She testified that she did not look for the jobs listed in the labor market survey because she did not get the letter that included the jobs until September 2003. She then testified that she applied for the jobs listed in the labor market survey – Singing River Hospital, Monroe Petroleum, and Swetman's Security. When asked by employers, she informed them of her knee problems; at some of the jobs, she volunteered the information. She claims that none of the jobs listed on the labor market survey were available when she tried to obtain them.

Although the positions available at Swetman Security could be considered suitable alternative employment because they include jobs in which Claimant would only be required to guard gates and not have to do walk arounds, the fact is that Claimant applied for a job with Swetman and did not get it. Employer may argue that Claimant purposefully sabotaged any chance she had in being hired by disclosing that she had prior surgeries to her knees. However, even if Claimant informed potential employers of her knee problems, she did not lie about her condition or make her condition out to be worse than it actually is. She merely advised potential employers that she had prior surgeries to her knees. "Denial of an employment opportunity based on a perceived need to make reasonable accommodations for a job applicant is . . . prohibited."[197] Because the ADA does not allow an employer to discriminate against a disabled employee, that fact that Claimant voluntarily informed potential employers of her disability does not prevent her from claiming that she diligently tried to secure suitable alternative employment. Claimant applied for the positions with Swetman Security and did not get hired or even called for an interview. The Court finds that she diligently searched for suitable alternative employment. Therefore, Claimant remained temporarily totally disabled from 31 Aug 02 through 2 Mar 04.

4 Mar 05 through present and continuing

Claimant's disability became permanent on 3 Mar 05, the date she reached MMI. Since she is unable to return to her usual employment as a welder, she has established a *prima facie* case of total disability. In the event that Employer demonstrates suitable alternative employment, Claimant will be limited to a scheduled award.

Claimant admitted that she did not start looking for jobs listed in the subsequent labor market survey dated 31 Jul 06[198] until 21 Aug 06. As of August 2006, Claimant applied for jobs at Best Western, Byrds Automotive, Thousand Trails, Treasure Bay Casino, Best Security, Boomtown Casino, IP Casino, Grand Casino, Walmart, Winn Dixie, and Mississippi Security Police. Even though Mr. Sanders testified that employers were waiving their experience and education requirements since Hurricane Katrina, she

[197] *Kulniszewski v. Swist*, 1998 WL 135815 (W.D.N.Y. 1998); *see also* 42 U.S.C. §12112(b)(5)(A)-(B).
[198] EX-24, p. 13

was not offered any of the jobs. Although Claimant did not diligently attempt to obtain employment prior to August 2006, her physical condition and abilities remained the same. She was unable to obtain a job from the many jobs that she did apply for after August 2006. Even though she provided some of those employers with her restrictions, those jobs are still not suitable alternative employment because Claimant must be able to perform those jobs regardless of her restrictions. Therefore, the Court finds that although the jobs listed in the subsequent labor market survey may have been suitable alternative employment, Claimant diligently tried to obtain employment and could not secure a position. For that reason, Claimant remained permanently totally disabled from 4 Mar 05 through present and continuing and is not limited to a scheduled award.

Section 8(f) Special Fund Relief

With a finding that Claimant is permanently totally disabled, it is necessary to address Employer's alternative argument that it is entitled to the Second Injury Fund relief because of Claimant's manifest pre-existing knee injuries.

a. Pre-existing Permanent Partial Disability

Claimant had arthroscopic surgery to her left knee on 31 Oct 86. She received disability compensation for that injury and continued to receive compensation even after she returned to work. She had right knee surgery in 1991. Dr. Cope informed her that she would have trouble working as a welder. Nevertheless, Claimant returned to work for Employer with restrictions. Dr. Cope released Claimant from active treatment in May 1991. She returned to work with a 10% disability rating to her right knee. She also received disability compensation related to her right knee injury.

Dr. Cope originally opined that Claimant reached MMI on 11 Nov 91 and that she would do better in a light duty position considering her type of knee problems. Claimant continued to have problems with her knee, but kept working because she wanted to work as long and as hard as she could until her knee would no longer allow. As of February 1992, Dr. Cope believed that Claimant could expect a gradual deterioration in her knee function as a result of the magnitude of her knee injury and the fact that she continues to work. In fact, Dr. Cope did not object to moving her MMI date to 1992. He opined that although she was at MMI, it did not mean that her condition would not deteriorate.

Claimant had additional knee problems in 1993 and 1994, with occasional problems all the way up to her 1999 work injury. In 1994, Dr. Cope concluded that Claimant had early degenerative arthritis of her right knee and prescribed her anti-inflammatories.

In sum, there is simply no question (and the Solicitor does not dispute) that Claimant had a pre-existing permanent partial disability related to her knees.

b. Manifest to Employer

Similarly, there is no question (and again the Solicitor does not dispute) that her pre-existing condition was manifest to Employer. Claimant first worked for Employer from 1971 through 1978. She went back to work for Employer on 12 Aug 85 and remained there up until her current work injury. She was placed on no work status in October 1986 for an arthroscopic surgery to her left knee. She was kept off work and received disability compensation for that injury. She returned to work with a 10% disability rating. She had additional knee problems in 1993 and 1994, all the way up to her 1999 work injury. However, between all times off from work due to her knee pain, Claimant worked for Employer. Claimant's injuries occurred while at work. As such, there is sufficient evidence to support that Employer knew of Claimant's knee problems and continued to employ her.

c. Current Disability Not Due Solely to Current Employment Injury

The Solicitor does dispute that Employer met its burden to show that Claimant's current disability is not due solely to her 16 Dec 99 employment injury. The Solicitor argues that based on Claimant's medical records, her present condition is a mere continuation of her prior injury and not a new injury that is materially and substantially greater due to a prior injury. On the other hand, Employer argues that Claimant's condition is materially and substantially greater than would have occurred had she not had her 1999 work injury.

The most probative evidence on this point is Dr. Johansen's testimony. He opined that although he could not ascribe a specific percentage, Claimant's pre-existing right knee injury from 18 Feb 91 combined with and contributed to the effects of any injuries she had on 16 Dec 99 to make her materially and substantially more disabled than she would have been as a result of the 16 Dec 99 injury alone. Dr. Black testified that although her arthritis had some impact on her work related injuries, it was not the sole cause. Prior to her present injury, Claimant was assigned a 10% disability impairment rating to her left lower extremity. However, since her 1999 work related injury, Claimant is now assessed with a 37% impairment rating to each lower extremity. This is a substantial increase in Claimant's disability that would likely not have happened had Claimant not had pre-existing knee problems and surgeries.

Accordingly, I find Employer is entitled to Section 8(f) relief from the Special Fund.

Penalties

Employer voluntarily paid compensation benefits to Claimant based on an average weekly wage of $608.00 from 26 May 00 through 30 Jul 00 and from 13 Nov 00 through 25 Feb 01.[199] On 1 Aug 00, Employer filed a notice of final payment of compensation because Claimant could return to work.[200] Employer filed another notice of suspension of benefits on 10 Oct 00 because permanent partial disability had been paid "in full."[201] Another notice of suspension of benefits was filed on 28 Feb 01 after Claimant returned to work for a second time.[202] The last notice of suspension of benefits was filed on 14 Aug 01 after Claimant was paid permanent partial disability benefits "in full."[203] The Court recognizes that the notices of suspension of benefits contained sufficient information to qualify as functional equivalents to a notice of controversion. Employer also filed notices of controversion on 17 Jun 02, 24 Jul 02, 3 Sep 02 and 9 Mar 05, related to AWW, special fund relief, and nature and extent of her disability.

Claimant seeks penalties on any and all underpaid compensation before the 17 Jun 02 notice of controversion. Employer argues that Claimant is not entitled to penalties since the filing of a notice of suspension of compensation in August 2000 is the functional equivalent to a notice of controversion.

The parties agree that Claimant became entitled to compensation benefits as of 26 May 00. In accordance with Section 14(b),[204] Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[205] Thus, Employer became liable for Claimant's disability compensation payments on 9 Jun 00.

Employer filed a notice of suspension of benefits on 1 Aug 00, which included the name of Claimant and Employer, the date of injury, and that Employer was terminating payments because Claimant could return to work. Accordingly, I find the claim was controverted on 1 Aug 00.[206] However, a notice of controversion should have been filed by 23 Jun 00[207] to be considered timely and prevent the application of penalties. Since Employer did not file a timely notice of controversion by 23 Jun 00, penalties will accrue from 26 May 00 through 31 Jul 00. Employer is liable for penalties on the difference between the $608 average weekly wage it paid and the $617.94 she was actually entitled to.

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[199] EX-6.
[200] EX-7, p. 1.
[201] EX-7, p. 2.
[202] EX-7, p. 4.
[203] EX-7, p. 5.
[204] 33 U.S.C. §914(b).
[205] Section 6(a) does not apply since Claimant suffered her disability for a period in excess of fourteen (14) days.
[206] *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (employer is not liable under Section 14(e) where it timely controverts but later abandons the defenses listed in its controversion and adopts new ones).
[207] Since Employer controverted the claim it had 28 days in which to file the notice of controversion.

ORDER AND DECISION

1. Claimant's average weekly wage at the time of her injury on 16 Dec 99 was $617.94.

2. Employer shall pay to Claimant temporary total disability benefits from 26 May 00 through 30 Jul 00, 13 Nov 00 through 25 Feb 01, and 31 Aug 02 through 3 Mar 05.

3. Employer shall pay to Claimant permanent total disability benefits from 4 Mar 05 through present and continuing.

4. Employer shall receive a credit for all prior disability benefits paid to Claimant.

5. Employer is entitled to Section 8(f) Special Fund Relief.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[208]

7. Employer shall pay penalties based on the difference in the average weekly wage voluntarily paid by Employer and the actual average weekly wage Claimant was entitled to from 26 May 00 through 31 Jul 00.

8. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

9. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[209] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such

[208] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267 (1984)

[209] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **23 Jan 06**, the date this matter was referred from the District Director.

application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge